IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Second Appeal No.77 of 2002
With
Civil Application No.139 of 2002

Kubrabai Dargahi — Appellant
Vs.
Smt. Ulfati D/o Abdul Gafoor — Respondent

Mr.Amol Mhatre h/f. Mr.P.K. Dhakephalkar for appellant.

CORAM: B.H.MARLAPALLE, J.

April 09, 2007.

P.C.

1. Heard the learned counsel for the appellant who was defendant in RCS No.582 of 1988. The said suit was filed by the present respondent - original plaintiff for injunction restraining the defendant from making any construction on her plot admeasuring 975 sq. yards out of Survey No.55, Hissa No.1 of village Nagaon, Taluka Bhiwandi (hereinafter referred to as "the suit plot") and for a declaration that the defendant has no right to make any construction and also for possession of the land after removing encroachment, if any, done on the suit land. When the suit was filed, it was alleged by the plaintiff that the foundation work of the proposed building of the defendant was in progress and while doing the same there was an encroachment in asmuchas the open

space which the plaintiff had left on the Northern side (North-South) of 7 ft. was likely to be reduced. When the suit was pending the construction was further progressed and, therefore, the plaintiff had filed an application at Exhibit 5 praying for restraining the defendant from proceeding further. This application was rejected and, therefore, during the pendency of the suit the defendant constructed a multi-storeyed building. During the trial of the suit, by considering the evidence of both the sides, the trial Court held that the plaintiff successfully proved her ownership on the suit plot and it further held that she could not prove that the defendant was constructing a house by encroaching upon the suit plot and consequently the suit was dismissed.

2. The plaintiff, therefore, filed Civil Appeal No. 160 of 1999 and the learned 4th Addl. District Judge at Thane was pleased to allow the appeal vide his judgment and order dated 9/3/2001 and RCS No.582 of 1988 was decreed by setting aside the judgment and decree passed by the trial Court. Hence this Second Appeal.

3. Both the Courts have recorded a concurrent

finding regarding the ownership of the plaintiff on the suit plot i.e. plot admeasuring 975 sq. yards out of Survey No.55, Hissa no.1 and, therefore, once her ownership was proved on the suit plot, the injunction would automatically follow. The appellant cannot have any objection to the first part of the decree and the appellant has a serious objection to the second part of the decree viz. the declaration that the defendant has no right to make any construction and also for possession of the land after removing encroachment, if any, done on the suit land.

4. Before the trial Court, in her written statement filed at Exhibit 14, the defendant admitted that the construction of her house was undertaken but by way of renovation. In the said written statement, it was also submitted that the entire house had fallen down and, therefore, the defendant had no alternative but to reconstruct the same and she also contended that for this reconstruction she had obtained sanction from the competent authority. The defendant's witness no.1 was examined at Exhibit 47 and nothing was brought on record in support of these contentions that the competent authority i.e. either

the Village Panchayat or the Municipal Council had granted permission for such reconstruction. She also contended that the allegation regarding encroaching of the open land was baseless whereas the plaintiff very specifically claimed that the open space of 7 ft. to the total length of 55 ft. was reduced to 5&1/2 ft. x 55 ft. The trial Court merely on the basis of oral statement made by the defendant that she had obtained permission from the competent authority, held that when such permission was granted the contentions of the plaintiff that there was encroachment could not be accepted. The plaintiff had pointed out that she had purchased the suit property prior to the defendant and she had constructed her house by leaving open space of 7 ft. When the defendant initially made an attempt to cause interference with the said open space in the year 1980, she was constrained to file RCS No.186 of 1980 and in the same ad-interim injunction was granted. The lower Appellate Court, therefore, held that once the possession and ownership of the plaintiff over the suit land was answered in the affirmative, consequential relief of perpetual injunction restraining the defendant from disturbing her peaceful possession and enjoyment over the suit

property ought to have been granted by the trial Court. No fault could be found with this finding.

5. So far as the second part is concerned, it is a conditional decree in asmuchas if it is found that there is any encroachment on the suit plot admeasuring 975 sq. yards and more particularly open space of 7 ft. width and 55 ft. length, the same will have to be removed and, therefore, a declaration has been given. If it is the defendant's case that she has not encroached upon the suit plot in any way, she need not be scared of the decree and while executing the decree it has to be ensured that the suit plot of 975 sq. yards is free from any encroachments and if it is not, the encroached portion will have to be demolished and that is the meaning of the second part of the decree. Even during the course of hearing of this second appeal, the learned counsel for the appellant could neither produce the permission granted by the competent authority nor the plan sanctioned for such construction which has been admitted by defendant in respect of her own house.

6. Hence this appeal does not involve any

substantial question of law and the same must fail at the threshold. The same is hereby dismissed in limine.

7. Civil Application does not survive and the same stands rejected.

(B.H.MARL